

The Administrative Law Judge found that claimant was not a credible witness and denied his request for permanent partial disability benefits. The parties requested the Appeals Board to review the following issues:

- (1) Did claimant sustain personal injury by accident arising out of and in the course of employment with respondent?
- (2) What is the nature and extent of claimant's injury and disability?
- (3) What is claimant's average weekly wage?
- (4) Is claimant entitled to any temporary total disability compensation?
- (5) Is claimant entitled to any past medical compensation?
- (6) Should costs of this proceeding be assessed against claimant?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds as follows:

The Award should be affirmed. The Appeals Board hereby adopts the findings and conclusions set forth by the Administrative Law Judge in the Award to the extent they are not inconsistent with those made below.

**(1) Did claimant sustain personal injury by accident arising out of and in the course of his employment with the respondent?**

The Administrative Law Judge found claimant sustained a work-related accident on November 2, 1993, when he stepped from a machine where he was changing a roll of shrink wrap and fell against a steel beam and onto the floor.

The Appeals Board agrees with the Administrative Law Judge's conclusion that claimant was injured at work on November 2, 1993. The Appeals Board also finds the accident arose out of and in the course of claimant's employment. Although there were no witnesses to the accident, claimant immediately told a coworker, Brian Keith Puhr, about the fall and requested Mr. Puhr to tell a supervisor. Mr. Puhr testified he did not see claimant fall but did see him kneeling with one knee on the floor and dirt on his back immediately after the alleged incident. Later that same day, respondent referred claimant to a chiropractor in Ottawa for treatment.

The Appeals Board finds the greater weight of evidence establishes that claimant sustained a work-related accident as alleged. Claimant's description of the accident has been consistent since the fall. In addition, Mr. Puhr's testimony places claimant on the floor with a somewhat disheveled appearance immediately after the incident.

**(2) What is the nature and extent of claimant's injury and disability?**

Because the Administrative Law Judge found claimant lacked credibility, the Judge denied claimant's request for permanent partial disability benefits. The Administrative Law Judge found claimant was untruthful regarding the activities he performed in his family's dairy operation, his ability to drive his tractor-trailer unit, and his ability to lift with his left arm. Further, the Judge found claimant was not entirely forthright in the medical history given to Nathan Shechter, M.D., the physician the Judge selected to provide an independent medical evaluation.

The Appeals Board agrees with the Administrative Law Judge's analysis. At the regular hearing which was recommenced on April 21, 1995, claimant represented he was not working on his family's dairy farm and that he had sold his tractor-trailer rig because he could not physically operate it. However, Anderson County Sheriff's Deputy, Andy Bair, testified claimant was driving the truck in September 1994 when it lost a wheel. While at the scene of the incident, the officer watched claimant help another person lift and place the approximate 200-pound wheel into the trunk of a car. Also, one of claimant's former friends, Michael Roberts, presented testimony contradictory to claimant's. Mr. Roberts assisted claimant on claimant's dairy farm during the summers of 1994 and 1995 and observed, among other things, claimant feed and milk the cows on a regular basis and drive the semi-tractor rig between 10 and 20 times. Witnesses Eugene Stephens and Allen Stephens also testified claimant was driving a tractor-trailer rig on several occasions during 1994 when claimant allegedly could not tolerate it.

Based upon the entire record, the Appeals Board finds claimant was untruthful regarding his abilities to work and perform physical activities after his November 1993 accident. The Appeals Board also finds claimant has failed to prove he sustained either permanent injury or permanent impairment as a result of the November 1993 accident.

As indicated by Howard F. Wilson, D.C., and Lynn A. Wilson, D.C., claimant has a history of neck, bilateral shoulder, and thoracic problems for which he sought chiropractic treatment commencing in 1989. Before the November 1993 accident, claimant was receiving chiropractic treatment for neck and right shoulder pain as late as March 1993. As late as July 1993, claimant was experiencing left arm pain. However, claimant failed to provide both Stephen L. Reintjes, M.D., and Nathan Shechter, M.D., with an accurate history of his prior problems with his neck, shoulders, and thoracic spine. Without an accurate history, the medical opinions of claimant's permanent functional impairment as a result of the November 1993 incident are flawed, unpersuasive, and carry little weight.

Because the evidentiary record contains no persuasive, credible evidence to establish that claimant's November 1993 accident caused either permanent functional impairment or permanent injury, the Appeals Board agrees with the Administrative Law Judge's analysis and conclusion that claimant's request for permanent partial disability benefits should be denied.

(3) **What is claimant's average weekly wage?**

The Administrative Law Judge found claimant's average weekly wage on the date of accident was \$387.87 which was comprised of \$280 per week base wage and \$107.87 per week for overtime. The parties do not dispute the Administrative Law Judge's computation of regular and overtime wages. However, claimant contends the Judge erred by failing to include in the computation an amount for the waste popcorn claimant was regularly allowed to take from respondent's plant without payment.

Claimant's testimony is uncontroverted that when he first began working for respondent he paid respondent \$25 per truck load for approximately 300 bushels of respondent's daily waste popcorn and overrun. After working for respondent for a period of time, respondent began giving claimant the waste popcorn free of charge. By the date of accident, claimant was picking up at least three semi-truck loads of popcorn per week, or the equivalent of 2,700 bushels.

The Appeals Board agrees with claimant's contention that an amount should be included in claimant's average weekly wage for the waste popcorn. However, as the waste popcorn would constitute "additional compensation" as that term is used in K.S.A. 44-511, claimant has failed to prove the average weekly cost to the respondent as required by that statute.

Claimant contends the Appeals Board should compute the value of the waste popcorn at \$25 per 300 bushels, or \$75 per semi-truck load, for a total of \$225 per week. However, the problem with that approach is there is no evidence that respondent's cost for the waste product approached that amount. K.S.A. 44-511(a)(2) provides:

The term "additional compensation" shall include and mean only the following: (A) Gratuities in cash received by the employee from persons other than the employer for services rendered in the course of the employee's employment; (B) any cash bonuses paid by the employer within one year prior to the date of the accident, for which the average weekly value shall be determined by averaging all such bonuses over the period of time employed prior to the date of the accident, not to exceed 52 weeks; (C) board and lodging when furnished by the employer as part of the wages, which shall be valued at a maximum of \$25 per week for board and lodging combined, unless the value has been fixed otherwise by the employer and employee prior to the date of the accident, or unless a higher weekly value is proved; **(D) the average weekly cash value of remuneration for services in any medium other than cash where such remuneration is in lieu of money, which shall be valued in terms of the average weekly cost to the employer of such remuneration for the employee;** and (E) employer-paid life insurance, health and accident insurance and employer contributions to

pension and profit sharing plans. In no case shall additional compensation include any amounts of employer taxes paid by the employer under the old-age and survivors insurance system embodied in the federal social security system. Additional compensation shall not include the value of such remuneration until and unless such remuneration is discontinued. If such remuneration is discontinued subsequent to a computation of average gross weekly wages under this section, there shall be a recomputation to include such discontinued remuneration. (Emphasis added.)

Because claimant has failed to prove respondent's cost of the waste popcorn as an additional compensation item, claimant's average weekly wage is \$387.87 as determined by the Administrative Law Judge.

**(4) Is claimant entitled to any temporary total disability compensation?**

At regular hearing the parties stipulated the respondent and its insurance carrier had paid claimant 35 weeks of temporary total disability compensation in the total sum of \$8,928.29. While the stipulations were being taken, neither party advised the Administrative Law Judge that there was any issue regarding claimant's entitlement to those 35 weeks. Without addressing the issue whether claimant was temporarily and totally disabled during the 35 weeks in question, the Administrative Law Judge awarded claimant those benefits.

Based upon a review of the entire record, the Appeals Board finds claimant's entitlement to the 35 weeks of paid temporary total disability benefits was not made an issue for the Administrative Law Judge to decide. Therefore, the Appeals Board will not review that issue for the first time on appeal. See K.S.A. 44-555c, as amended, where the legislature restricts Appeals Board review to those issues which are first presented to the Administrative Law Judge. Although respondent and its insurance carrier in their submission letter requested the Administrative Law Judge to deny claimant all temporary total disability compensation, the issue was not one before the parties at the time they were deposing their witnesses and introducing their evidence.

**(5) Is claimant entitled to any past medical compensation?**

Respondent and its insurance carrier request the Appeals Board to deny claimant an award for past medical expense. They argue claimant's treatment was neither reasonable nor necessary because claimant allegedly never had any injuries which required treatment.

At the December 1994 regular hearing, the parties stipulated that respondent had furnished claimant medical and hospital treatment in the sum of \$13,381.93. At the time stipulations were taken respondent did not raise the propriety of that medical expense as an issue to be determined by the Judge. The only issues the parties raised regarding

medical benefits were claimant's entitlement to mileage reimbursement and a \$300 outstanding bill with Larry J. Matney, D.C.

In the Award the Administrative Law Judge awarded claimant reimbursement of medical mileage and payment of the \$300 medical expense with Dr. Matney. The Administrative Law Judge did not address the issue whether all of claimant's medical expense should have been denied.

The Appeals Board notes the respondent and its insurance carrier in their submission letter requested the Administrative Law Judge to deny claimant all medical compensation. However, at that time the parties had already taken their depositions and submitted their evidence to address those issues earlier designated at the December 1994 regular hearing. Other than the issues regarding mileage reimbursement and Dr. Matney's expense, the Appeals Board finds respondent and its insurance carrier did not raise the issue of claimant's entitlement to past medical compensation to the Administrative Law Judge. Therefore, the Appeals Board will not address that issue for the first time on this review.

Regarding the issues of medical mileage reimbursement and Dr. Matney's expense, the Appeals Board adopts the conclusions set forth by the Administrative Law Judge and finds that they should be reimbursed or paid by the respondent and its insurance carrier as authorized medical expense.

**(6) Should the costs of this proceeding be assessed against the claimant?**

As punishment respondent and its insurance carrier request the Appeals Board to assess the costs of this proceeding against the claimant. The Appeals Board finds that request should be denied. Due to claimant's lack of candor regarding his post-accident activities and medical history, the Appeals Board found claimant failed to satisfy his burden of proving he sustained either permanent injury or permanent impairment as a result of the November 2, 1993, accident. That finding does not preclude the possibility that claimant sustained an injury which might adversely affect his abilities to work. Rather it indicates claimant failed to prove his case with competent, persuasive evidence.

When considering the entire record, the Appeals Board finds that respondent and its insurance carrier should be responsible for the administrative costs associated with this proceeding as the Administrative Law Judge ordered.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award dated March 12, 1996, entered by Administrative Law Judge Alvin E. Witwer should be, and hereby is, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Gerald C. Golden, Kansas City, KS  
John David Jurcyk, Lenexa, KS  
Philip S. Harness, Director